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Techrew Sdn Bhd v Nurhamizah bt Hamzah (sued as sole proprietor of Chamber of Nur Hamizah Hamzah) & Ors

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J-02(NCvC)(W)-712–06 OF 2020
HANIPAH FARIKULLAH, AZIZAH NAWAWI AND AHMAD NASFY JJCA
12 APRIL 2022

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Tort — Negligence — Professional negligence — Whether trial court wrongly dismissed professional negligence claim against advocates and solicitors — Whether facts and evidence clearly showed lawyers had been negligent in their handling of plaintiff's court proceedings — Whether trial court wrong to have awarded only nominal damages when plaintiff had proven the loss it had suffered — Whether trial judge wrongly rejected trial testimonies of two of plaintiff's three witnesses

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The main contractor ('MAB') in a construction project had sued the appellant (its subcontractor) for RM5.85m in liquidated and ascertained damages for delayed completion of works. The appellant appointed the first respondent ('R1') advocate and solicitor to defend it in the suit. R1 entered an appearance and filed a defence for the appellant but on MAB's application, the court struck out the defence on the ground that it was a mere denial and did not disclose a reasonable defence. The court gave judgment to MAB for the sum claimed ('the judgment sum'). The appellant filed an appeal against the decision to the Court of Appeal ('COA') and thereafter terminated R1's services and instructed her to forward all cause papers to his newly-appointed lawyers, namely, the second and third respondents ('R2' and 'R3') who were partners in a legal firm ('LAS'). LAS wrote to inform R1 that they had been instructed by the appellant to take over conduct of the matter but R1 did not respond. LAS, however, did not file and serve a notice of change of solicitor; neither did R1 file a notice discharging herself from further acting for the appellant. R1 therefore continued to remain on the record as the appellant's solicitor. When the date for case management of the COA appeal arrived, R2 appeared before the registrar and was given time to file a formal application for extension of time to file the appeal record. That application was never filed. Since none of the three respondents appeared on the day the appeal was called up for hearing, and the appeal record was never filed, the COA struck out the appeal. Meanwhile, MAB had sent the appellant a statutory demand under the Companies Act 2016 warning that winding up proceedings would be taken against the appellant if it failed to pay the judgment sum. The appellant negotiated with MAB and the parties executed a settlement agreement ('SA') under which the

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appellant agreed to pay RM2.85m in full and final settlement of the judgment sum. Thereafter, the appellant sued the respondents for RM5.85m on the ground that they had been professionally negligent in their handling of the court proceedings between itself and MAB. Following a trial, the High Court dismissed the claims against R2 and R3, held that only R1 was liable for negligence and ordered it to pay the appellant nominal damages of RM50,000 on the ground that the appellant had not proven its loss. In coming to her decision, the trial judge disregarded the testimonies of the appellant's lawyer ('PW2') — on the ground that he had given opinion evidence which he was not qualified to give — and its managing director ('PW3') — on the ground that his evidence contained discrepancies and inconsistencies and was therefore unreliable. In the instant appeal, the appellant argued that the trial judge was wrong in absolving R2 and R3 of blame, in holding that the testimonies of PW2 and PW3 were unacceptable and in awarding the appellant only nominal damages. In a cross-appeal, R1 sought to reduce the quantum of nominal damages it was ordered to pay and also sought to vary the trial court's order that it should bear the legal costs of R2 and R3. At the appeal hearing, the appellant said R1's cross-appeal was defective and invalid pursuant to rr 5 and 8 of the Rules of the Court of Appeal 1994 ('the RCA').

Held, unanimously allowing the appeal, dismissing R1's cross-appeal, setting aside the High Court's order dismissing the claim against R2 and R3, awarding the appellant RM2.85m in damages and ordering that R1 pay the appellant half of that sum (RM1,425,000) and that R2 and R3 pay the appellant the balance of that sum:

(1) The trial judge was plainly wrong in dismissing the appellant's claim against R2 and R3. On the totality of the evidence, the appellant had proven on balance of probabilities that R2 and R3 had breached the duty and standard of care they owed the appellant. They were properly appointed by the appellant to take over the conduct of the appeal from R1 vide the execution of the warrant to act and the payment of a portion of the agreed fees. The solicitor-client relationship between R2 and R3 and the appellant was thus not inchoate as the conditions for the retainer had been completed. R2 and R3 neither applied for a stay of the winding up proceedings against the appellant nor took over the conduct of the appeal by filing a notice of change of solicitor, resulting in the appeal being struck off (see paras 45–46, 49 & 57–58).

(2) R2 and R3 sought to avoid liability simply on the grounds that: (a) they did not receive a no-objection from R1 as to their taking over conduct of the matter; and (b) they did not receive the cause papers from R1. These were contrived reasons. In their letter to R1, R2 and R3 had said that they would be filing the notice of change of solicitor since the appellant had informed them that R1 had no objections to their taking over the conduct of the appeal. In any event, nothing on the record showed that

R1 had refused consent. The facts established that R2 and R3 had acted half-heartedly in handling the appellant's brief and fell short of the professional standard expected of a solicitor in similar circumstances. R2 and R3 sought to invoke r 54 of the Legal Profession (Practice and Etiquette) Rules 1978 to contend that their non-appearance was brought about by the fact that R1 continued to remain on record as acting for the appellant. Such self-serving and disingenuous argument could not be countenanced and was not bona fide especially in view of the fact that R2 had appeared for the appellant at the COA for the case management (see paras 45 & 48).

(3) In respect of damages, it was plain that the claim for the judgment sum was not sustainable. The appellant and MAB had, however, entered into a settlement agreement under which MAB agreed to accept RM2.85m as full and final settlement of the judgment sum. The appellant had a real prospect of succeeding in its COA appeal but due to the professional negligence of the respondents, it was deprived of that chance of success. In the circumstances, the trial court's award of nominal damages to the appellant was not just (see paras 59 & 63).

(4) The trial judge had unnecessarily spent much time deliberating whether expert evidence was necessary to determine the liability of the respondents. In the process, she had wrongly rejected PW2's evidence. The facts in the instant case were simple and straightforward and did not require the assistance of expert evidence. There was nothing in the facts and evidence to show that PW2 was not an independent witness. On the contrary, he had full knowledge of what had transpired during the proceedings at the COA. He was a witness of fact and there was no reason to disbelieve his evidence. For all intents and purposes, he did not give evidence as an expert (see paras 50–53).

(5) With regard to PW3, the trial judge ruled that his evidence was fragmentary, inconsistent and unsafe to rely upon. However, on careful consideration of PW3's evidence, this court was of the view that the trial judge erred in finding that PW3 was not a truthful witness. Discrepancies in his testimony did not straight away make PW3 unreliable or the whole of his evidence unacceptable (see paras 54–56).

(6) The appellant's contention that R1's notice of cross-appeal contravened rr 5 and 8 of the Rules of the Court of Appeal 1994 was sustained. R1 did not appeal against the finding of liability but merely sought leave to vary that part of the decision ordering it to bear the costs of R2 and R3. The awarding of costs was a matter of exercise of discretion of the trial court and unless it was clearly shown that the order made was irregular or without basis, the appellate court would not interfere with such exercise of discretion. However, as this court departed from the trial court to find

that R2 and R3 were liable to the appellant, the trial court's decision on the award of costs had to be set aside (see paras 40–41).

[Bahasa Malaysia summary

Kontraktor utama ('MAB') dalam projek pembinaan telah menyaman perayu (subkontraktor) sebanyak RM5.85 juta untuk ganti rugi kerana kelewatan projek tersebut disiapkan. Perayu telah melantik responden pertama ('R1') peguam bela dan peguamcara untuk mewakilinya dalam saman tersebut. R1 memasukkan kehadiran dan memfailkan pembelaan untuk perayu tetapi atas permohonan MAB, mahkamah menolak pembelaan mereka atas alasan bahawa ianya adalah penafian semata-mata dan tidak mendedahkan pembelaan yang munasabah. Mahkamah memberikan penghakiman kepada MAB untuk jumlah yang dituntut tersebut ('jumlah penghakiman'). Perayu memfailkan rayuan terhadap penghakiman tersebut ke Mahkamah Rayuan ('MR') dan selepas itu menamatkan perkhidmatan R1 dan mengarahkannya untuk mengemukakan semua kertas kausa kepada peguamnya yang baru dilantik, iaitu responden kedua dan ketiga ('R2' dan 'R3') yang merupakan rakan kongsi di dalam firma guaman ('LAS'). LAS menyerahkan surat untuk memaklumkan kepada R1 bahawa mereka telah diarahkan oleh perayu untuk mengambil alih kes tersebut tetapi R1 tidak membalas surat tersebut. LAS, bagaimanapun, tidak memfailkan dan menyampaikan notis penukaran peguamcara; dan R1 juga tidak memfailkan notis yang melepaskan dirinya daripada bertindak selanjutnya untuk perayu. Oleh itu, R1 terus kekal dalam rekod sebagai peguam perayu. Apabila tarikh untuk pengurusan kes rayuan MR tiba, R2 hadir hadapan pendaftar dan diberi masa untuk memfailkan permohonan rasmi untuk lanjutan masa untuk memfailkan rekod rayuan. Permohonan tersebut tidak pernah difailkan. Oleh kerana tiada seorang pun daripada ketiga responden muncul pada hari rayuan tersebut dipanggil untuk pendengaran, dan rekod rayuan juga tidak pernah difailkan, MR telah membatalkan rayuan tersebut. Sementara itu, MAB telah menghantar notis statutori kepada perayu di bawah Akta Syarikat 2016 yang memberi amaran bahawa prosiding penggulungan akan dimasukkan terhadap perayu sekiranya mereka gagal membayar jumlah penghakiman tersebut. Perayu telah berunding dengan MAB dan memasuki perjanjian penyelesaian ('SA') di mana perayu bersetuju untuk membayar RM2.85 juta untuk penyelesaian penuh jumlah penghakiman secara muktamad. Selepas itu, perayu menyaman responden sebanyak RM5.85 juta atas alasan kecuaian profesional dalam mengendalikan prosiding mahkamah tersebut. Selepas perbicaraan, Mahkamah Tinggi menolak tuntutan terhadap R2 dan R3, dengan alasan bahawa hanya R1 yang bertanggungjawab atas kecuaian dan memerintahkannya membayar ganti rugi nominal perayu sebanyak RM50,000 atas alasan bahawa perayu tidak berjaya membuktikan kerugiannya. Dalam membuat keputusannya, hakim perbicaraan telah mengabaikan keterangan peguam perayu ('PW2') — dengan alasan bahawa dia tidak layak memberikan keterangan — dan pengarah urusannya ('PW3')

— dengan alasan bahawa keterangannya mengandungi bercanggah dan tidak boleh dipercayai. Di dalam rayuan ini, perayu berhujah bahawa hakim bicara adalah khilaf dalam menolak tuntutan terhadap R2 dan R3 dengan memutuskan bahawa keterangan PW2 dan PW3 tidak boleh diterima dan dalam memberikan perayu hanya ganti rugi nominal. Dalam rayuan balas, R1 memohon untuk pengurangan kuantum ganti rugi nominal dan memohonan untuk mengubah perintah mahkamah untuk kos undang-undang R2 dan R3. Pada pendengaran rayuan, perayu berhujah bahawa rayuan silang R1 adalah defektif dan tidak sah menurut kk 5 dan 8 Kaedah-Kaedah Mahkamah Rayuan 1994 ('KKMR').

Diputuskan, sebulat suara membenarkan rayuan, menolak rayuan silang R1, mengenepikan keputusan Mahkamah Tinggi yang mengenepikan tuntutan terhadap R1 dan R2 dan memerintahkan bayaran ganti rugi sebanyak RM2.85m terhadap perayu dan memerintahkan R1 membayar perayu separuh dari jumlah tersebut (RM1,425,000) dan R2 dan R3 membayar jumlah bakinya:

(1) Hakim bicara jelas terkhilaf kerana menolak tuntutan perayu terhadap R2 dan R3. Perayu telah membuktikan melebihi keseimbangan kebarangkalian berdasarkan keseluruhan keterangan bahawa R2 dan R3 telah melanggar kewajipan dan tugas berhati-hati kepada perayu. Mereka telah dilantik dengan oleh perayu untuk mengambil alih kes rayuan daripada R1 melalui waran untuk bertindak dan dibayar dengan bayaran guaman secara sebahagian. Oleh itu, hubungan peguamcara-pelanggan antara R2 dan R3 dan perayu tidak terjejas kerana syarat-syarat perlantikan telah dipenuhi. R2 dan R3 tidak memohon penangguhan prosiding penggulungan terhadap perayu atau mengendalikan kes rayuan dengan memfailkan notis penukaran peguam cara, menyebabkan rayuan tersebut dibatalkan (lihat perenggan 45–46, 49 & 57–58).

(2) R2 dan R3 berusaha memohon untuk mengelakkan liabiliti dengan alasan bahawa: (a) mereka tidak menerima tiada bantahan dari R1 mengenai tindakan mereka mengambilalih kes tersebut; dan (b) mereka tidak menerima kertas kausa daripada R1. Ini adalah rekaan semata-mata. Di dalam surat mereka kepada R1, R2 dan R3 telah menyatakan bahawa mereka akan memfailkan notis penukaran peguamcara kerana perayu telah memberitahu mereka bahawa R1 tidak mempunyai bantahan terhadap tindakan mereka mengambilalih kes rayuan tersebut. Dalam apa jua keadaan, tiada apa-apa dalam rekod menunjukkan bahawa R1 telah menolak persetujuan tersebut. Fakta-fakta membuktikan bahawa R2 dan R3 telah bertindak sambalewa dalam menangani arahan perayu dan tidak memenuhi standard profesional yang diharapkan kepada peguam cara. R2 dan R3 memohon untuk menggunapakai k 54 Kaedah-Kaedah Profesion Undang-Undang (Amalan dan Etika) 1978 dalam menghujahkan bahawa kehadiran

mereka disebabkan bahawa R1 kekal dalam rekod sebagai peguamcara untuk perayu. Hujahan ini tidak dapat dipertimbangkan dan jelas merupakan tidak bona fide kerana R2 telah hadir sebagai perayu di MR ketika pengurusan kes (lihat perenggan 45 & 48).

(3) Berkenaan dengan ganti rugi, jelas bahawa tuntutan untuk jumlah penghakiman tidak boleh dipertahankan. Perayu dan MAB, bagaimanapun, telah memeterai perjanjian penyelesaian di mana MAB bersetuju untuk menerima RM2.85 juta sebagai penyelesaian penuh dan akhir jumlah penghakiman. Perayu mempunyai prospek sebenar untuk berjaya dalam rayuan MR tetapi disebabkan oleh kecuaian profesional responden, mereka telah kehilangan peluang untuk berjaya. Dalam keadaan ini, mahkamah bicara memberikan ganti rugi nominal kepada perayu adalah tidak adil (lihat perenggan 59 & 63).

(4) Hakim bicara tidak perlu menghabiskan banyak masa untuk menilai keterangan pakar untuk menentukan liabiliti responden. Hakim bicara telah terkhilaf dalam menolak keterangan PW2. Fakta dalam kes ini adalah mudah dan tidak memerlukan bantuan keterangan pakar. Tiada apa-apa dalam fakta dan keterangan menunjukkan bahawa PW2 bukan saksi bebas. Sebaliknya, dia mempunyai pengetahuan penuh tentang apa yang telah berlaku semasa prosiding di MR. Dia adalah saksi menurut dan tiada alasan untuk tidak mempercayai keterangannya. Dia juga tidak memberi keterangan sebagai pakar (lihat perenggan 50–53).

(5) Berkenaan PW3, hakim bicara memutuskan bahawa keterangannya adalah tidak lengkap, tidak konsisten dan tidak selamat untuk dipercayai. Walau bagaimanapun, atas pertimbangan yang teliti terhadap keterangan PW3, mahkamah ini berpendapat bahawa hakim bicara terkhilaf dalam memutuskan bahawa PW3 bukan saksi yang jujur. Perbezaan di dalam keterangannya tidak langsung menjadikan PW3 tidak boleh dipercayai atau keseluruhan buktinya tidak boleh diterima (lihat perenggan 54–56).

(6) Hujahan perayu bahawa notis rayuan silang R1 menyalahi kk 5 dan 8 Kaedah-Kaedah Mahkamah Rayuan 1994 mempunyai merit. R1 tidak merayu terhadap penemuan liabiliti tetapi hanya memohon kebenaran untuk mengubah sebahagian keputusan yang memerintahkannya untuk menanggung kos R2 dan R3. Pemberian kos adalah budi bicara mahkamah bicara dan melainkan sekiranya jelas menunjukkan bahawa perintah yang dibuat adalah tidak teratur atau tanpa asas, Mahkamah Rayuan tidak akan mengganggu pelaksanaan budi bicara tersebut. Walau bagaimanapun, oleh kerana mahkamah ini memutuskan bahawa R2 dan R3 bertanggungjawab kepada perayu, keputusan mahkamah perbicaraan mengenai kos harus diketepikan (lihat perenggan 40–41).]

Cases referred to

Chan Kwee Fong v PP [2010] 1 MLJ 441, CA (refd)
Kabushiki Kaisha Ngu v Leisure Farm Corp Sdn Bhd & Ors [2016] 5 MLJ 557; [2016] 8 CLJ 149, FC (refd)
Lee Kuang Guat (suing as the father of the deceased, Lee Chu Ling) v Chiang Woei Chien (practicing as Chiang Chambers, Advocates and Solicitors) [2021] 3 MLJ 505; [2021] 3 CLJ 237, CA (refd)
Lim Soh Wah & Anor v Wong Sin Chong & Anor & Another Appeal [2001] 2 CLJ 344, CA (refd)
Midland Bank Trust Co Ltd and another v Hett, Stubbs & Kemp (a firm) [1978] 3 All ER 571, ChD (refd)
Mount v Barker Austin 14 LDAB 98, CA (folld)
PP v Datuk Haji Harun bin Haji Idris (No 2) [1977] 1 MLJ 15 (refd)
Sharif and others v Garret & Co (a firm) [2002] 3 All ER 195, CA (folld)
Shearn Delamore & Co v Sadacharamani a/l Govindasamy [2017] 1 MLJ 486, CA (refd)
Sri Alam Sdn Bhd v Tetuan Radzuan Ibrahim & Co (sued as a firm) [2010] 1 MLJ 284; [2010] 1 CLJ 913, HC (refd)
Tetuan Theselim Mohd Sahal & Co & Ors v Tan Boon Huat & Anor [2017] 4 MLJ 207; [2017] 6 CLJ 368, CA (refd)
Wong Chop Saow v PP [1965] 1 MLJ 247 (refd)
Wong Swee Chin v PP [1981] 1 MLJ 212; [1980] 1 LNS 138, FC (refd)

Legislation referred to

Companies Act 2016 ss 465, 466
Courts of Judicature Act 1964 s 69(1), (4), (5)
Evidence Act 1950 ss 45, 136(1)
Legal Profession (Practice and Etiquette) Rules 1978 rr 42, 54
Rules of Court 2012 O 40A r 2(1), (2), O 64
Rules of the Court of Appeal 1994 rr 5, 8

Appeal from: Civil Suit No JA-23NCVC-2–01 of 2019 (High Court, Johor Bahru)

Reuben a/l Netto (with Chandrakandan a/l Sankaran and Maithily a/p Monoher) (C Sankaran & Co) for the appellant.
Chen Wai Jiun (WJ Chen & Co) for the first respondent.
S Gunasegaran (with J Chandrika) (John Ang & Guna) for the second and third respondents.

Ahmad Nasfy JCA:

INTRODUCTION

[1] This is an appeal by the appellant against the decision of the learned judicial commissioner ('learned JC'), in respect of the followings:

(a) dissatisfied with the nominal damages awarded against the first respondent; and

(b) dismissing the appellant's claim against the second and third respondent. Whilst the first respondents by way of cross-appeal seeking leave to vary the learned JC's decision that she had to bear costs of the second and third respondent.

[2] We heard the appeal and after giving our most anxious and meticulous consideration on the submissions from the appellant's counsel as well as the counsel for the respondents and after careful perusal of the record of appeal, we are satisfied that there are merits in the appeal warranting appellate intervention. Hence, we unanimously allowed the appeal. The following are our grounds in arriving at the decision.

BACKGROUND FACTS

[3] The appellant is a company incorporated in Malaysia. The first respondent is an advocate and solicitor of the High Court of Malaya, practising as a sole proprietor. The second and third respondents, are also advocates and solicitors, who were partners of a legal firm, named in the title of the action.

[4] The appellant's claim in the court below, against the respondents, is, for, inter alia, damages in the amount of RM5.85m for professional negligence in the handling of the legal proceedings between Miracle Assets Builder Sdn Bhd ('MAB') and the appellant ('MAB suit').

[5] In the MAB suit, MAB was the main contractor in a construction project. It had appointed the appellant as one of the sub-contractors. MAB had instituted an action against the appellant in December, 2017 for liquidated ascertained damages in the amount of RM5.85m for late completion of the works ('LAD'). At the material time, the solicitors for MAB were the firm of Messrs Clarence Edwin Law Offices, of which Datuk Clarence Edwin ('PW2') and Mr Paramanandan ('Mr Param') are the partners.

[6] The appellant appointed the first respondent to defend the MAB suit, and she accordingly entered an appearance and filed the defence. However, on 17 April 2018, MAB was successful in its application to strike out the

A appellant's defence on the ground that it is a mere denial and did not disclose a reasonable defence. As a result, the judgment in the sum of RM5.85m was entered against the appellant.

B **[7]** The appellant then lodged an appeal on 30 April 2018. A notice dated 8 May 2018 was sent by the Court of Appeal to the first respondent, informing her that she had to file the record of appeal within 90 days of the decision which was being appealed against. The appeal was fixed for case management on 18 July 2018.

C **[8]** Meanwhile, the appellant terminated the services of the first respondent via a letter dated 2 June 2018 (exhibited at p 57 of the Common Bundle of Documents ('CBD)) and requested her to immediately forward all the documents to the second and third respondent's law firm, whom it claimed to have appointed as its new solicitors.

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[9] On 6 June 2018, after the appellant had appointed the second and third respondent's law firm as its solicitors under a warrant to act (exhibited at p 50 of the CBD), the law firm sent to the first respondent, letters dated 6 June 2018 (exhibited at p 64 of the CBD) and 12 June 2018 (exhibited at p 13 of the respondents' additional bundle of document), regarding the taking over of the conduct of the matter, to which there was no response whatsoever. However, no notice of change of solicitors was filed in the Court of Appeal, and as such, the first respondent remained on record as the appellant's solicitor.

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F **[10]** Nevertheless, on 18 July 2018, the second respondent appeared before the Deputy Registrar of the Court of Appeal for case management. Since the date for filing of the record of appeal had already lapsed, the Deputy Registrar of the Court of Appeal gave the appellant until 27 July 2018 to file a notice of motion for extension of time to file the record of appeal. This, however, was not done.

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[11] Subsequently, a notice dated 10 August 2018 was issued by the Registry of the Court of Appeal. The first respondent then replied to state that she was no longer the solicitor for the appellant, and that the new solicitors were the second and third respondents' law firm. As a result of this information, although there was neither a notice of change of solicitors nor an order for discharge of solicitors, the Registry of the Court of Appeal sent a notice dated 17 August 2018 to the second and third respondents' law firm informing them that the date of disposal of the appeal would be on 27 August 2018.

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[12] Since neither the first respondent nor the second or third respondent had attended court on 27 August 2018, the Court of Appeal struck out the appeal for the reasons that the record of appeal had not been filed, and that no

application had been made for an extension of time to file the same. It is to be noted that before the appellant's appeal was struck out, MAB had sent a notice dated 18 July 2018 to the appellant making a statutory demand under ss 465/466 of the Companies Act 2016 for payment of the judgment sum.

[13] The appellant then had to negotiate with MAB on the settlement of the judgment sum and eventually a settlement agreement dated 21 November 2018 was entered between MAB and the appellant for the sum of RM2.85m ('the settlement agreement'). The appellant, on 6 December 2018, successfully applied for a stay of a winding up order.

[14] On 30 January 2019, the appellant instituted this action against all the three defendants to recover a sum of RM5.85m.

[15] After a full trial, the learned JC found the first respondent was liable and nominal damages was awarded to the appellant. The claim against the second and third respondents was dismissed.

THE HIGH COURT'S DECISION

[16] In short, the appellant's case against the first respondent was for negligence in the performance of her professional duties to the appellant in the MAB suit, in particular, for the following:

(a) failing to inform and advise the appellant about the striking out application by the High Court, and the implications thereof;

(b) failing to inform and advise the appellant of the proceedings pertaining to the appeal to the Court of Appeal, and to attend to matters with regard thereto; and

(c) failing to follow-up with the second and third respondent's law firm pertaining to transferring the matter to them, and to notify them regarding the appeal to the Court of Appeal.

[17] Whilst the case against the second and third respondents were also for professional negligence, in particular, for the following:

(a) failing to prepare and file the notice of change of solicitors; and

(b) failing to attend to matters pertaining to the appeal to the Court of Appeal, which caused the appellant's appeal to the Court of Appeal to be struck out.

[18] At the trial, the appellant called three witnesses. They are:

A (a) Mohd Azhar bin Baba (PW1) — an employee of Maxis Broadband Sdn Bhd;

(b) Datuk Clarence Edwin (PW2) — Advocate and Solicitor of the High Court of Malaya; and

B (c) Ten Sing Jeng (PW3) — Managing Director of the appellant.

[19] In gist, the appellant's evidence of its averment on the liability of the respondents and the losses suffered as a result thereof, emanated mainly through PW2. The respondents, unhappy with that evidence, applied to C expunge the evidence of PW2 on the basis that the evidence that he gave was in the nature of an opinion, for which he was not qualified to give. The learned JC had agreed with the respondents and ruled to expunge PW2's evidence which was characterised as opinion evidence and a scrutiny of the grounds of D judgment showed that the following was given as the reasons:

(a) that the appellant was unable to assist the court when asked which statutory provision allowed for the opinion of PW2 to be admissible, bearing in mind that the areas of expertise provided for in s 45 of the Evidence Act 1950, did not provide for PW2's evidence to be proffered; E and

(b) the appellant failed to establish the expertise of PW2 as prescribed by plethora of authorities, including *Wong Chop Saow v Public Prosecutor* [1965] 1 MLJ 247, and *Chan Kwee Fong v Public Prosecutor* [2010] 1 F MLJ 441.

[20] At the conclusion of the trial and during the submission, the appellant urged the court to reverse the earlier ruling in respect of the opinion evidence of PW2, since it was the appellant's contention that the opinion evidence of an G advocate and solicitor is allowed in cases of professional negligence, based on the cases of *Shearn Delamore & Co v Sadacharamani a/l Govindasamy* [2017] 1 MLJ 486 and *Tetuan Theselim Mohd Sohal & Co & Ors v Tan Boon Huat & Anor* [2017] 4 MLJ 207.

H **[21]** The learned JC was clearly unimpressed with the appellant's submission and instead went to hold that PW2 had transcended his role in court and that pursuant to O 40A r 2(1) of the Rules of Court 2012 ('the ROC 2012'), the expert's function is to assist the court on the matters within his expertise, but in the case before the learned JC, she found that PW2 was overzealous in his I answers and had given conclusions on matters which are eminently matters for the court to decide; would tend to arrogate to himself the functions of the court. The learned JC also found that as a witness of both opinion and fact, PW2's role in the MAB suit rendered his presence in this case, as a witness for the appellant, highly irregular. He was the counsel who acted for and advised

MAB on the approach and strategy to be adopted against the appellant in the MAB suit and was successful in the application being entered against it for RM5.85m. The learned JC took, to us, a rather adverse view by again charactering the evidence of PW2 as some sort of a remarkable twist to the tale, since PW2, without being subpoenaed had voluntarily agreed to give evidence on behalf of the appellant and even attempted to demonstrate how to set aside the very judgment that he himself had obtained. Thus, the learned JC held that the involvement of PW2 in this claim is highly improper and was contrary to r 42 of the Legal Profession (Practice and Etiquette) Rules 1978. At this juncture, the learned JC had concluded that the presence of the PW2 in court as a witness for the appellant compromised his partiality. In view of these findings, the learned JC held that the evidence of PW2 cannot be accepted.

[22] As regards the evidence of PW3, first and foremost, the learned JC found that he was inconsistent in his evidence on the winding up proceedings instituted by MAB against the appellant. His initial position was that he was ignorant of the same, but when prodded during cross-examination, he admitted having knowledge of it but claimed that he had discovered it from other sources. In respect of his association with PW2, he was initially evasive and denied having met him, but after further questioning, he admitted having met PW2, not once but twice, to arrange for the settlement of the MAB suit. The learned JC then concluded that the evidence of PW3 was, in total, unreliable.

[23] The learned JC also found that the appellant had failed to disclose the settlement agreement executed between the appellant and MAB which contained the following terms:

(a) that MAB agree to accept the sum of RM2.85m as a full statement of the sum owing in the MAB suit;

(b) that the appellant shall pay the agreed settlement amount in instalments;

(c) that the appellant may apply to the High Court for a stay of the winding up order and the settlement agreement be recorded as part of the order granting a stay; and

(d) that the appellant shall withdraw all pending proceedings filed on its behalf in relation to the judgment.

[24] It is to be noted that pursuant to the settlement agreement, the appellant had withdrawn its notice of motion in the Court of Appeal to reinstate the appeal and was also successful in obtaining a stay of the winding up order, which was granted by the High Court on 6 December 2018.

[25] It is not in dispute that the settlement agreement was discovered and

adduced by the second and third respondents during the trial. The appellant had objected to the disclosure of the same on the ground that the original sum of RM5.85m was not paid rendering the settlement agreement irrelevant. The learned JC held that the appellant's argument was untenable as there was no valid reason in law to object to the disclosure of the same. In addition, it is not for the appellant to decide on the relevancy or otherwise of the settlement agreement as provided for in sub-s (1) of s 136 of the Evidence Act. As such the learned JC ruled that the settlement agreement was relevant as first and foremost, it formed part of the narrative in light of the revelation that the appellant had initially filed an application in Court of Appeal to reinstate the appeal but withdrawn it later as part of the settlement agreement.

[26] The respondents' arguments, in summary, was that each of them owed no duty of care and thus cannot be held liable for any professional misconduct in carrying out their respective role as solicitors for the appellant and thus was not responsible for any loss suffered by the appellant.

[27] For the first respondent, it was argued that too much emphasis had been placed on the first respondent remaining as solicitor on record, but that, it was further submitted, had no effect on the matter, since the appellant had terminated her services with effect from 2 June 2018, and therefore, the first respondent owed no duty of care to the appellant thereafter.

[28] In this regard, the learned JC was of the view that as solicitor on record, it is important to look at O 64 of the ROC 2012 which deals with the change of solicitors. The provision reads:

> Order 64 — Change of Solicitor
>
> Rule 1 — Change of Solicitor by Notice.
>
> (1) A party to any cause or matter who sues or defends by a solicitor may change his solicitor without an order for that purpose but *unless and until a notice of the change is filled and served in accordance with this rule, that former solicitor shall, subject to rule 4 and 5, be considered the solicitor of the party until the final conclusion of the cause or matter*.
>
> (2) A notice of a change of solicitor in Form 136 shall be filed in the Registry.
>
> (3) The party giving the notice shall serve on every other party to the cause or matter (not being a party in default as to entry of appearance) and on the former solicitor a copy of the notice.
>
> (4) The party giving the notice may perform the duties prescribed by this rule in person or by his new solicitor. (Emphasis added.)

[29] In short, the learned JC held that the first respondent was liable for her total failure of communication in the following aspects:

(a) failure to comply with the instructions of the appellant via letter dated 2 June 2018, where she was specially requested by the appellant to immediately allow the second and third respondents' law firm to have the relevant documents;

(b) failure to respond to the letters dated 6 June 2018 and 12 June 2018 from the second and third respondents' law firm, although she added that whilst she herself had not sighted the second letter, she conceded that members of her law firm might have had; and

(c) failure to return telephones calls from the second and third respondents' law firm relating to the appeal at the Court of Appeal which eventually resulted in the appeal being struck off.

[30] In addition, the learned JC also found that the first respondent had failed to attend the case management at the Court of Appeal on 18 July 2018, and thus did not have personal knowledge of what transpired on that day, which necessarily meant that whatever she said in evidence as being hearsay. Despite having received a notice dated 10 August 2018 from the Court of Appeal, and in the absence of a notice of change of solicitor or discharge order, the first respondent had failed to take the necessary steps to prosecute the appeal. The only thing which she did was to place a call to the Registry of the Court of Appeal informing that she was no longer the solicitor, a representation which led to the Court of Appeal issuing a notice to the second and third respondents' law firm, which we must state, is rather irregular, as at all times, the first respondent remained on record as the solicitor for the appellant.

[31] The learned JC also held that if the first respondent could make the effort to communicate with the Court of Appeal and even provide it with details of the second and third respondents' law firm, it would not have been an onerous a task for her to respond to the second and third respondent's letter (via emails) and telephone calls. In this regard, the learned JC found that there was absolutely no excuse or reason whatsoever for her failure to communicate with the second and third respondents law firm. As such in this case, the root of the liability of the first respondent lay in the fact that there was no communication at all.

[32] The first respondent undisputedly accepted that the second and third respondents' law firm must obtain the relevant cause papers as well as the consent of the first respondent since she was the solicitor on record. This is in accordance with r 54 of the Legal Profession (Practice and Etiquette) Rules 1978. The first respondent also candidly admitted that she did not do as requested by the second respondent, resulting in the second and third respondents' law firm's inability to proceed further to file the notice of change of solicitors.

[33] The learned JC was of the further view that the taking over of the matter by the second and third respondents' law firm was conditional upon receiving the relevant cause papers, and obtaining the consent of the first respondent, both of which had not been fulfilled. The second and third respondent's law firm could not have been faulted for attending the case management despite not being the solicitor on record. Looking at the evidence as a whole, the learned JC did not find that the second respondent to be dishonest or evasive as claimed by the appellant. Thus, it was concluded by the learned JC that there was no reason to disbelieve him. As such the appellant 's claim against both the second and third respondents was dismissed.

Whether the appellant had suffered loss?

[34] Upon analysis, the learned JC held that damages was proved, on a balance of probabilities in that the appellant has suffered loss as a result of the first respondent's negligence. After considering all the relevant evidence, both oral and documentary, the learned JC found that the appellant had failed to prove that he had a real and substantial prospect of success in the appeal and thus the case rested on a mere negligence. In addition, the alleged loss as claimed was merely based on speculation and conjecture.

[35] In short, since the first defendant was found to be liable but the plaintiff had failed to prove the loss suffered, the learned JC held that an award of nominal damages was apt. Therefore, the first defendant was ordered to pay RM50,000 and costs in the amount of RM20,000 subject to allocator fees.

GROUNDS OF APPEAL

[36] Before us, the appellant had sought to assail the decision of the learned JC on several grounds. We trust that no injustice will be visited upon the appellant or learned counsel by us summarising the grounds, as follows:

(a) the learned JC failed to hold the second and third respondents are to be liable for a breach of their duty of care as solicitors for the appellant in failing to attend or sufficiently attend to the appellant's appeal in the Court of Appeal vide Civil Appeal No J-02(IM)(NCvC)-797–05 of 2018 ('the said appeal');

(b) the learned JC failed to judicially appreciate the effect of second and third respondents, collectively as partners of the firm and as husband and wife, signing the solicitors' retainer (warrant to act) dated 6 June 2018 with the appellant agreeing to take over conduct of the said appeal from the first respondent in exchange for an agreed solicitors' fee of RM150,000, of which RM30,000 was for the filing of the stay of the winding up proceedings (which was eventually undertaken by Messrs Thomas Lai & Wallace) and RM120,000 for the taking over the conduct of the appeal

proper. To that end, the appellant had paid the firm a sum of RM78,000. Therefore, the decision to dismiss the appellant 's claim for negligence against the second and third respondents is plainly wrong;

(c) the learned JC misapprehended and misdirected herself in holding that the evidence of Datuk Clarence Edwin (PW2) was compromised because his opinion was based on the settlement agreement dated 21 November 2018 ('SA'), which his firm had prepared and, therefore, his testimony amounted to being in complicity with PW3 and, therefore not independent;

(d) failing to sufficiently consider the legal effect of the second and third respondents signing the warrant to act on 6 June 2018 with the appellant,

(e) failing to consider at all the WhatsApp messages where the appellant was appealing to the second respondent to do all that was necessary to attend to the said appeal;

(f) failing to consider at all the credibility of second respondent's testimony against the contemporaneous documents such as the firm's retainer and second respondent's letter of 6 June 2018 and 12 June 2018 to the first respondent and second respondent's and the subsequent conduct in appearing before the Deputy Registrar of the Court of Appeal as stated above. The two conditions for taking over testified to by the second respondent lacked proof and runs against the term of the warrant to act;

(g) failing to consider at all that first respondent and second respondent's retainer obligated them to professionally attend to and advice the appellant and attend to matters relating to the terms of their retainer of which the filing of the notice of change of solicitors was a mere procedural step common in the legal fraternity; and

(h) the learned JC had wrongly applied the Legal Profession (Practice and Etiquette) Rules 1978 ('the LPPE') as rule of law, as opposed to rules of conduct, governing members of the legal profession in holding that second and third respondents' appointment was conditional upon obtaining consent from D1 in taking over conduct of the appeal and, therefore, could not have abdicated from their duties as solicitors for the appellant.

[37] In respect of damages, it was submitted that the learned JC had failed to award the appellant, damages of RM5.85m due or at the very least RM2.85m as per the settlement agreement payable by the appellant to MAB due to the respondents' breach of their solicitors' duties to the appellant.

[38] As regards to the cross-appeal, it was contended by the first respondent that the learned JC had erred in directing the first respondent to pay the second

and third respondents' costs in the sum of RM30,000 as it is unexplainable from the standpoint of first respondent being held liable in negligence to the appellant and not second and third respondents. In essence, the first respondent is seeking by way of a cross-appeal to vary the learned JC's order that the first respondent bears the costs of second respondent and the third respondent and reduce the quantum of nominal award pursuant to s 69(1), (4) and (5) of the Courts of Judicature Act 1964 ('the CJA 1964').

PRELIMINARY OBJECTION

[39] Learned counsel for the appellant, at the outset of the hearing, had raised a preliminary objection that the variation sought in the cross-appeal goes beyond what is permitted under rr 5 and 8 of the Rules of the Court of Appeal 1994. In short, the rules do not allow an appeal against the substantive finding of the court where the first respondent wants the decision to be reversed or set aside. In short, the first respondent ought to have filed a separate appeal.

[40] We have heard the submissions and at this juncture sustain the objection that the first respondent's cross-appeal contravened rr 5 and 8 of the Rules of the Court of Appeal 1994 and s 69(1), (4) and (5) of the CJA 1964 cannot be used to cure the defect in the notice of cross-appeal. Simply put first respondent has failed to appeal against the quantum of the award but only award as to costs in favour of second and third respondent. In this regard useful reference may be made to the decision of the Federal Court in the case of *Kabushiki Kaisha Ngu v Leisure Farm Corp Sdn Bhd & Ors* [2016] 5 MLJ 557; [2016] 8 CLJ 149 (FC) wherein the court had examined the distinction between a cross-appeal and the need to file a notice of appeal in given circumstances. We should add that as a matter of prudence it is advisable for a party to file a separate notice of appeal if the party wishes to challenge the propriety of the decision of the court appealed from as the scope of 'variation' that could be obtained through a notice of cross-appeal is rather limited. Many had fallen into the mistake of filing a cross-appeal without understanding the purpose and scope of the same, a step taken perhaps as a hedging the bests hoping that the cross-appeal may bring results. Such a practice, akin to taking a gamble many a time, had proven to be disastrous, as gambling does.

OUR DECISION OF THE APPEAL

[41] As alluded to earlier, the first respondent, in point of fact, did not appeal against the finding of liability and thus there is a clear acceptance of the finding of liability. Instead, she is seeking leave to vary the part of the decision as regards to cost to be paid to second and third respondents. We must say at once that, on principles, the issue of costs is a matter of discretion, for which the trial court will be entitled to determine and that based on the fact pattern on this case the trial court is entitled to make orders for costs including the making of

Bullock or Sanderson order. The appellate court will be, as against the making of discretionary order, very slow in interfering with the exercise of discretion unless clearly demonstrated that the same is made irregularly or without basis. In the present case, given the position that we have taken with regard to the liability of the second and third respondent against the plaintiff, it is unnecessary for us to make any finding on this exercise of discretion to award costs against the first respondent save to say that the decision on that award of costs must accordingly be set aside.

[42] The relationship between a solicitor and his client is dictated by a contract but liability is not in contract alone. There is liability in tort too and that the liability could be concurrent — see the analysis in *Midland Bank Trust Co Ltd v Hett Stubbs & Kemp (a firm)* [1978] 3 All ER 57 and accepted by this court in *Lim Soh Wah & Anor v Wong Sin Chong & Anor & Another Appeal* [2001] 2 CLJ 344 (CA). It is to be recalled that the appellant's claim against the respondents is premised on professional negligence. The requirement to sustain a claim in professional negligence against a solicitor is not the same as the requirement to prove a case in negligence simpliciter that does not involve a professional. This court in the case of *Shearn Delamore & Co v Sadacharamani a/l Govindasamy* [2017] 1 MLJ 486 held that:

> [12] In negligence case, there are, inter alia, three elements which need to be pleaded and established. However, in professional negligence case there is a fourth element which must be pleaded and proved and that is related to standard of care.

[43] Thus, in a professional negligence case such as the present case, the appellant was required to prove the following elements to succeed in its claims against the respondents:

(a) duty of care;

(b) standard of care;

(c) whether that standard of care was breached; and

(d) damages.

[44] To recapitulate, the following facts are relevant:

(a) that the first respondent had failed to keep the appellant informed of its case, especially when the said case was struck out by the Court of Appeal causing a judgment to be entered against the appellant for RM 5.85m by MAB;

(b) that the first respondent had not kept the appellant informed of the proceedings in the Court of Appeal, especially, the issue of transferring the said appeal to the second and third respondents' firm;

(c) that the first respondent had signed a retainer for RM25,000;

(d) that second and third respondents had not filed the notice of change of solicitors;

(e) that the second and third respondents had not attended to the appeal at the Court of Appeal which resulted in the appeal being struck off.;

(f) that the second and third respondents had signed a warrant to act to take over conduct from first respondent and to get up the case at the Court of Appeal, including filing a stay of proceedings for an agreed fee totalling RM150,000; and

(g) that the appellant had to enter into a settlement agreement for which it was required to pay the sum of RM2.85m to MAB.

[45] Learned counsel for the second and third respondents sought to support the decision of the learned JC in holding that the second and third respondents should not be liable for the appellant in professional negligence and sought to justify their actions in not prosecuting the appeal on two reasons: first that the non-receipt of no-objection from the first respondent and secondly the non-receipt of the cause papers also from the first respondent. We must be forgiven for classifying this argument as a form of blame shifting, whereby the blame lies elsewhere. The second and third respondents however were at pains to shun the facts that the second and third respondents were properly appointed by the appellant to take over conduct of the said appeal from first respondent after signing a warrant to act dated 6 June 2018 for an agreed fee of RM30,000 for a stay of execution proceedings and RM120,000 to handle the appeal toward the end where, in total, a sum of RM78,000 was paid to the firm on 8 August 2018. In short, there is a retainer in place between the appellant and the second and third respondent. Here we must state at once that the relationship of solicitor and client between the appellant and the second and third respondent cannot be said to be inchoate as the conditions for the retainer have been completed where the task required to be undertaken and the fees have been agreed upon. This is not a case where the appellant was merely prospecting to appoint the second and third respondent as solicitor or that it is a case of implied retainer. It is different if the second and/or third respondent had not signed the warrant to act or were merely meeting the appellant with a view of taking up the case. Suppose the second and third respondent merely met with any of the appellant's directors and discussed about the cases but had neither signed by letter of appointment or agreed on fees, then in such a case, there could be a valid justification for the second or third respondent to say that neither express nor implied retainer could be said to have been established.

[46] It is undisputed that the second and third respondents neither applied for a stay of the winding up proceeding nor attended to the brief by pursuing

the taking over of the conduct of the said appeal by filing a notice of change of solicitors, resulting in the appeal being struck off on 27 August 2018 with costs of RM4,000 being ordered by the court. The appellant only came to know of what transpired at the Court of Appeal when it received a statutory notice under the Companies Act 2016 from MAB to wind up the appellant if the judgment sum of RM5.85m is not paid. The evidence showed that PW3 contacted second respondent on his mobile phone demanding an explanation, but the second respondent informed that PW3 should not be anxious as he would take care of the matter.

[47] Upon discovering that the appeal was struck out, PW3 sought the service of Messrs C Sankaran & Co to file a negligence suit against the respondents as pleaded in the SOC.

[48] Having considered the facts in totality, we are of the view that the only reason that the second and third respondents are clinging upon is to avoid liability, namely the non-receipt of the no objection and the cause papers from the first respondent, is in fact, a contrived reason. It is clear that the second and third respondents had admitted in their letter of 6 June 2018 to the first respondent that they would be filing the notice of change of solicitors since the appellant had informed them that the first respondent had no objections to them taking over of conduct of the appeal. In any event, there is nothing on record to show that the first respondent had refused consent. Even if there is such a refusal the second and third respondent should be aware of the steps that could be taken for them to take over conduct of the appeal from the first respondent. What the facts established was that the second and third respondent were acting half-heartedly in handing the brief and thus fell short of the professional standard of the solicitor in similar circumstances. We noted that the second and third respondent sought to press into service the Legal Profession (Practice and Etiquette) Rules 1978 in particular, r 54 so as to shield them from liability in that their non-appearance was brought about by the fact that the first respondent remaining on record. We must say that such self-serving and a rather disingenuous argument cannot be countenanced. The Rules must not be brought to serve the second and third respondent in that manner; rather it is to regulate the professional conduct between lawyers and parties to a litigation. In any event, the rule had not prevented the second respondent from appearing at the Court of Appeal for the case management earlier. This therefore, lend great credence to the submission that the argument of the second and third respondent as being lacking in bona fides.

[49] Premised on the facts and evidence we are of the view that the appellant has satisfied the trite elements of professional negligence, that the second and third respondents owed a duty of care against the appellant and the duty have

A been breached. Accordingly, the decision of the learned JC is plainly wrong on this point and must be set aside.

Whether expert evidence is necessary to assist the court?

B **[50]** We have in the earlier part of this judgment referred to the relevant part of the decision of the learned JC wherein she had rejected the evidence of PW2 on the basis that some of the evidence offered by the witness appears to be that which should be given by an expert. We must state that the learned JC appeared to be obsessed or consumed with characterising the evidence of the witness as C if the assessment of an evidence is a pigeonhole exercise by classifying according to defined categories. We find that such a practice is unwarranted. Much of the learned JC's time was dominated by the issue of whether expert evidence is necessary to determine the liability of the defendants before her. Given the state of confusion we find it necessary to reiterate the following observations of Raja D Azlan Shah CJ (as he then was) in *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212; [1980] 1 LNS 138, on the role of the expert:

> Our system of jurisprudence does not, generally speak, remit the determination of dispute to experts. Some question are left to the robust good sense of a jury. Others E are solved by the conventional wisdom of a judge sitting alone. In the course of elucidating disputed questions, aids in the form of expert opinion are in appropriate cases placed before juries or judges. *But except on purely scientific issues expert evidence is to be used by the court for the purpose of assisting rather than compelling the formulation of the ultimate judgments*. In the ultimate analysis it is the tribunal of F fact, whether it be a judge or jury, which is required to weight all the evidence and determine the probabilities, it cannot transfer this task to the expert witness the court must come to its own opinion. (Emphasis added.)

[51] To our mind in the instant case, the facts are simple and straight G forward in which expert evidence is unnecessary. Reverting to the evidence presented by PW2, the learned JC ruled that PW2's role in the MAB suit rendered his presence in this case, as a witness for the appellant (who was the opponent or adversary of his client), highly irregular. PW2 was the counsel who had acted for and advised MAB on approach and strategy to be adopted H against the appellant in the MAB suit and was successful in the application to strike out the appellant's defence, which resulted in judgment being entered against it for RM5.85m. PW2 was held to be overzealous in his answers and had no qualms in concluding with absolute conviction that the respondents were indeed negligent. The PW2 also was held not to be an independent I witness prescribed by O 40A r 2(2) of the ROC. Which reads:

> Order 40A – Experts of parties
>
> Rule 2- Expert's duty to Court
>
> ...

(2) This duty overrides any obligation to the person from whom he has received instructions or by whom he is paid.

[52] To satisfy ourselves, we have perused the evidence of PW2 with a fine toothcomb. He testified the following:

(a) he represented MAB in the said MAB suit filed against the plaintiff;

(b) MAB succeeded in striking-out the defence and entering judgment for the sum of RM5.85m on 17 April 2018;

(c) an appeal was filed against the judgment and a letter dated 18 May 2018 was issued by the Court of Appeal informing that the record of appeal ('ROA') must be filed by 17 July 2018 and fixing 18 July 2018 as a case management date;

(d) no draft index of the record of appeal was served on him as required under Court of Appeal Rules;

(e) on 18 July 2018, he attended to the case management. The first respondent did not appear. Instead, the second respondent appeared and informed the Deputy Registrar that he was instructed to take over conduct of the matter from first respondent and he would be filing an application for extension of time to file the record of appeal. The Deputy Registrar then fixed 10 August 2018 to enable second respondent to file the said application;

(f) on 10 August 2018, neither first nor the second respondent appeared, forcing the Deputy Registrar to fix the appeal for disposal on 27 August 2018. No notice of change of solicitors was filed;

(g) PW2 received two letters dated 10 August 2018 and 17 August 2018 from the Court of Appeal informing first and the second respondent of the hearing before the panel falling on 27 August 2018. Since neither first nor second respondent appeared the court struck out the appeal; and

(h) sometime towards the end of 2018, PW3 visited him seeking advice as to how to resolve the matter. PW2 advised PW3 to seek independent legal advice as to whether first respondent and/or second and third respondent were professionally negligent, in particular, where despite second respondent attending on 18 July 2018, the second and third respondents being the partners of the legal firm had failed to comply with the COA's directions.

[53] In our judgment, there is nothing that could be concluded that PW2 is not an independent witness. On the contrary, he has the full knowledge of what was transpired during the proceedings at the Court of Appeal. He was a witness of fact. Hence, there was no reason to disbelieve him. For all intent and

purposes, he cannot be said to be giving evidence as an expert and in so far as he purports to give his view that evidence could of course be disregarded.

[54] As regards PW3, the learned JC had ruled that his evidence is fragmentary and, as a result thereof unsafe to rely upon. Among others, he was inconsistent in his evidence on the winding up proceedings instituted by MAB against the appellant. He was ignorant of the same, but when prodded during cross-examination, he admitted knowledge of it but claimed that he had discovered it from other sources. Regarding his association with PW2, he was initially evasive and denied having met him, but after further questioning, he admitted having met PW2 to arrange for the settlement of the MAB suit.

[55] We have also carefully considered PW3's evidence which may be summarised as follows:

(a) he had appointed first respondent to defend the said MAB suit after paying 50% of on agreed retainer fee of RM25,000 based on a retainer dated 21 February 2018. The said retainer could be terminated upon notifications in writing;

(b) after entering an appearance, the first respondent filed the defence without consulting the appellant, resulting in the said defence being nothing more than a bare denial. Judgment for the sum of RM5.85m together with costs of RM1,000 was accordingly entered on 17 April 2018;

(c) first respondent did not inform the plaintiff of the above. He heard of the same from his consultant, MAC;

(d) second and third respondents were appointed to take over conduct of the said appeal from the first respondent after signing a warrant to act dated 6 June 2018 for an agreed fee. Toward that end, a sum of RM78,000 was paid to the firm on 8 August 2018;

(e) second and third respondents failed to discharge their professional duties in not applying for a stay or attending to take over of the said appeal resulting in the appeal being struck off on 27 August 2018 with costs of RM4,000 being ordered by the court; and

(f) PW3 then contacted second respondent for explanation. No satisfactory explanation was given.

[56] In light of the above, we are of the view that the learned JC was too preoccupied in the pigeon-hole exercise and therefore erred in her finding that PW3 is not a truth full witness when he gives evidence on something not direct to the pivotal issues of the case. To our mind, the discrepancy in testimony, does not straight away make the witness unreliable or make the whole of his

evidence is unacceptable. On this point, Raja Azlan Shah FJ in the of *Public Prosecutor v Datuk Haji Harun bin Haji Idris (No 2)* [1977] 1 MLJ 15, had this to say:

> ... in my opinion, discrepancies there will always be, because in the circumstances in which the events happened, every witness does not remember accurately every single thing that happened ... The question is whether the existence of certain discrepancies is sufficient to destroy their credibility. There is no rule of law that the testimony of a witness must either be believed in its entirely or not at all. A court is fully competent, for good and cogent reasons, to accept one part of the testimony of a witness and to reject the other.

[57] It is our considered judgment that on the totality of evidence as a whole, the appellant had on the balance of probabilities, proved that the second and third respondent has breached the standard of care while they are well aware that they have a duty to exercise reasonable degree of care and skill and diligence expected of a competent and reasonable experience solicitor — *Sri Alam Sdn Bhd v Tetuan Radzuan Ibrahim & Co* [2010] 1 MLJ 284; [2010] 1 CLJ 913; *Tetuan Theselim Mohd Sahal & Co & Ors v Tan Boon Huat & Anor* [2017] 4 MLJ 207; [2017] 6 CLJ 368; *Lee Kuang Guat (suing as the father of the decased, Lee Chu Ling) v Chiang Woei Chien (practicing as Chiang Chambers, Advocates and Solicitors)* [2021] 3 MLJ 505; [2021] 3 CLJ 237.

[58] It is trite and axiomatic that a solicitor has a duty to prosecute the action, including an appeal or to undertake the necessary getting up on a brief with reasonable care, skill, and diligence. If therefore, the action is struck out for failing to comply with the directions or failure to act within time limits or for want of prosecution, it is no defence to an action for damages for breach of duty to plead ignorance of law and rules or shifting the blame to third parties, unless the client has caused or consented to action or inaction of the solicitor. In the present case, the learned JC was plainly wrong when she dismissed the appellant's claim against the second and third respondent.

The assessment of damages

[59] In respect of damages, it is plain that the claim for the sum equivalent to the judgment is not sustainable. It is in evidence that the settlement agreement had been executed where MAB agreed to accept the sum of RM2.85m as full and final settlement of the sum owing in the MAB suit and that pursuant to the settlement agreement, the appellant withdrew its notice of motion to the Court of Appeal to reinstate the appeal.

[60] At this juncture it is apposite to refer to the applicable legal principles on whether the plaintiff had proved, on a balance of probabilities, that it had suffered loss for a claim of this nature, which is a loss of chance, which could be

found in the *locus classicus,* in *Mount v Barker Austin* 14 LDAB 98 (CA):

> Per Moore-Bick J:
>
> When a person sues his former solicitors for negligence in the conduct of proceedings which has led to his action being struck out his loss is normally measured by reference to his prospects of success in the primary litigation: see *Kitchen v Royal Air Forces Association* [1958] 2 All ER 241; [1958] 1 WLR 563. *However, in order to recover for the loss of that kind the court must be satisfied that the Plaintiff had at least a 'real' or 'substantial' chance that he would have succeeded in the primary action, not merely a speculative one*: *Allied Maples Group Ltd v Simmons & Simmons* [1995] 4 All ER 907 ; [1995] 1 WLR 1602 per Stuart-Smith LJ at p 1614 of the latter report. If his prospects of success fall short of that, the court will a scribe no value to them, but provided the court can see that there were real prospects of success it will evaluate them notwithstanding the difficulties that may involve. The need to evaluate the prospects of success in that way usually arises because of uncertainty as to the final shape of the evidence which would have been before the court trying the primary action. In some cases, however, the outcome of the primary action is not in doubt, for example, if it can be seen that the claim is bad in law and could never have succeeded. In such a case, of course, there never were any prospects of success at all.' (Per Moore-Bick J). (Emphasis added.)
>
> Per Simon Brown LJ:
>
> With these considerations in mind I would state the applicable principles as follows:
>
> (i) The legal burden lies on the Plaintiff to prove that in losing the opportunity to pursue his claim (or defence to counter-claim) he has lost something of value i.e. that his claim (or defence) had a real and substantial rather than merely a negligible prospect of success (I say 'negligible' rather than 'speculative' the word used in a somewhat different context in *Allied Maples Group Ltd v Simmons & Simmons* [1995] 1 WLR 1602 — lest 'speculative' may be thought to include considerations of uncertainly of outcome considerations which in my judgment ought not to weigh against the Plaintiff in the present context, that of struck-out litigation).
>
> (ii) The evidential burden lies on the defendants to show that despite their having acted for the Plaintiff in the litigation and value to their client, so that he lost nothing by their negligence in causing it to be struck out. Plainly the burden is heavier in a case where the solicitors have failed to advise their client of the hopelessness of his position and heavier still where, as here, two firms of solicitors successively have failed to do so. If of course, the solicitors have advised their client with regard to the merits of his claim (or defence) such advice is likely to be highly relevant.

[61] In the present case, we find that there is evidence to show that the appellant and MAB had come to a settlement by way of the settlement agreement where a sum of RM2.85m was to be paid by the appellant to MAB.

[62] In *Sharif and others v Garret & Co (a firm)* [2002] 3 All ER 195, the respondent firm of solicitors was sued in negligence when its client's case was struck out for want of prosecution. Simon Brown LJ speaking for the Court of Appeal in the following reasoning laid down a two-tier approach to the assessment of damages:

> In stating the principles generally applicable to this class of case, I indicated in *Mount v Barker Austin (a firm)* [1998] PNLR 493 at 510, 511 a two-stage approach. First, the court has to decide whether the claimant has lost something of value or whether on the contrary his prospects of success in the original action were negligible. Secondly, assuming the claimant surmounts this initial handle, the court must then 'make a realistic assessment of what would have been the plaintiff's prospects of success had the original litigation been fought out'.
>
> With regard to the first stage, the evidential burden rests on the negligent solicitors: they, after all, in the great majority of these cases will have been charging the claimant for their services and failing to advise him that in reality his claim was worthless so that he would be better off simply discontinuing it. The claimant, therefore, should be given the benefit of any doubts as to whether or not his original claim was doomed to inevitable failure. With regard to the second stage, the *Armory v. Delamirie* (1722) 1 Stra 505; [1558-1774] All ER Rep 121 principle comes into play in the sense that the court will tend to assess the claimant's prospects generously given that it was the defendant's negligence which has lost him the chance of succeeding in full or fuller measure.

[63] Guided by the legal principles in the above cases, we find that the appellant has lost something of value and that there is prospect of success in his appeal. There is nothing on record to show that the first or second and third respondent had discharged the evidential burden of showing that either of them had advised the appellant on the negative prospect of the appeal; on the contrary, the second respondent had advised differently. We accordingly find that and assess the prospect generously and arising from the first as well as the second and third respondent's professional negligence the appellant had been deprived of the chances of success of defending the claim in the MAB suit. We find that the award of nominal damages will not be just in the circumstances.

CONCLUSION

[64] Based on the aforesaid reasons, curial intervention is required, and we accordingly do so. The appeal is therefore allowed and the order of the High Court in respect of the second and third respondent is hereby set aside.

[65] We enter judgment for the appellant and award damages of RM2.85m to be apportioned equally in the sum of RM1,425,000 each between the first respondent on one part and the second and third respondent of the other part. We further order that the first respondent to pay the appellant costs of RM10,000. The second and third respondent too must pay to the appellant

costs of RM10,000. In respect of the cross-appeal, having upheld the preliminary objection with costs of RM3,000 to be paid to the appellant by the first respondent. We so order.

Order accordingly.

Reported by Ashok Kumar